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No. 93-391

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

CAPITAL IMAGING ASSOCIATES, P.C.,
Petitioner,

v.

MOHAWK VALLEY MEDICAL ASSOCIATES, INC., AND
MOHAWK VALLEY PHYSICIANS' HEALTH PLAN, INC.,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER, for purposes of summary judgment, the Rule of Reason relieves a plaintiff from the requirement of showing a genuine issue of material fact regarding actual anticompetitive effects or market power?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
STATEMENT OF THE CASE	1
I. Statement of the Facts	1
II. Proceedings Below	3
A. Opinion of the District Court	3
B. Opinion of the Court of Appeals	4
SUMMARY OF THE ARGUMENT	7
ARGUMENT—REASONS FOR DENYING CERTIORARI	9
I. COURTS HAVE CONSISTENTLY APPLIED THE RULE OF REASON ANALYSIS THAT PLACES THE INITIAL BURDEN ON THE PLAINTIFF TO SHOW THAT THE CHALLENGED CONDUCT PRODUCES ADVERSE EFFECTS ON THE MARKET	9
A. The Challenged Conduct Has Not Caused Any Restraints on Output	11
B. The Challenged Conduct Has Not Caused a Restraint on Prices	15
C. The Challenged Conduct Has Not Caused a Restraint on Quality	16
D. Capital Has Failed To Show That the Health Plan Has Market Power	17
E. The Burden of Proof Shifts to the Health Plan Only After Capital Has Shown Anticompetitive Effects	21

TABLE OF CONTENTS—Continued

Page

II. THE RULE OF REASON IS APPLICABLE TO BOTH HORIZONTAL AND VERTICAL RESTRAINTS 22

III. THE CONDUCT CHALLENGED BY CAPITAL IS NOT A NAKED RESTRAINT 24

CONCLUSION 26

TABLE OF AUTHORITIES

CASES — Page

A-Abart Electric Supply, Inc. v. Emerson Electric Co., 956 F.2d 1399 (7th Cir.), *cert. denied*, 113 S. Ct. 194 (1992) 10
Alberta Gas Chemicals, Ltd. v. E.I. du Pont de Nemours & Co., 826 F.2d 1235 (3d Cir. 1987), *cert. denied*, 486 U.S. 1059 (1988) 13
Arizona v. Maricopa County Medical Society, 457 U.S. 332 (1982) 8, 25
Associated General Contractors v. California State Council of Carpenters, 459 U.S. 519 (1983) 25
Austin v. McNamara, 979 F.2d 728 (9th Cir. 1992) 22
Ball Memorial Hospital, Inc. v. Mutual Hospital Insurance, Inc., 784 F.2d 1325 (7th Cir. 1986) .. 18
Bhan v. NME Hospitals, Inc., 929 F.2d 1404 (9th Cir.), *cert. denied*, 112 S. Ct. 617 (1991) 8, 22, 26
Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1 (1979) 25
Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717 (1988) 7
Capital Imaging Associates, P.C. v. Mohawk Valley Medical Associates, Inc. ("Capital I"), 725 F. Supp. 669 (N.D.N.Y. 1989) 2, 3, 4, 14
Capital Imaging Associates, P.C. v. Mohawk Valley Medical Associates, Inc. ("Capital II"), 791 F. Supp. 956 (N.D.N.Y. 1992) 4, 6, 8, 19
Capital Imaging Associates, P.C. v. Mohawk Valley Medical Associates, Inc., 996 F.2d 537 (2d Cir. 1993) ..... *passim*
Cayman Exploration Corp. v. United Gas Pipe Line Co., 873 F.2d 1357 (10th Cir. 1989) 11
City of Chanute v. Williams Natural Gas Co., 955 F.2d 641 (10th Cir.), *cert. denied*, 113 S. Ct. 96 (1992) 13
Coffey v. Healthtrust, Inc., 955 F.2d 1388 (10th Cir. 1992) 12, 13, 16
Collins v. Associated Pathologists, Ltd., 844 F.2d 473 (7th Cir.), *cert. denied*, 488 U.S. 852 (1988) 22

TABLE OF AUTHORITIES—Continued

Page

Copy-Data System, Inc. v. Toshiba America, Inc., 663 F.2d 405 (2d Cir. 1981) 12, 16

Crane & Shovel Sales Corp. v. Bucyrus-Erie Co., 854 F.2d 802 (6th Cir. 1988) 12, 16

DeLong Equipment Co. v. Washington Mills Abrasive Co., 887 F.2d 1499 (11th Cir. 1989), *cert. denied*, 494 U.S. 1081 (1990) 17

In re Detroit Automobile Dealers Ass'n, 955 F.2d 457 (6th Cir.), *cert. denied*, 113 S. Ct. 461 (1992) 24

Eastman Kodak Co. v. Image Technical Services, Inc., 112 S. Ct. 2072 (1992) 8, 13, 17

FTC v. Indiana Federation of Dentists, 476 U.S. 447 (1986) 20

FTC v. Superior Court Trial Lawyers Association, 493 U.S. 311 (1990) 7

Ferguson v. Greater Pocatello Chamber of Commerce, Inc., 848 F.2d 976 (9th Cir. 1988) 12, 16

Fishman v. Estate of Wirtz, 807 F.2d 520 (7th Cir. 1986) 18

Flegel v. Christian Hospital Northeast-Northwest, 1993-2 Trade Cas. (CCH) ¶ 70,355 (8th Cir. 1993) 10, 22

Futurevision Cable System v. Multivision Cable TV, 789 F. Supp. 760 (S.D. Miss. 1992), *aff'd*, 986 F.2d 1418 (5th Cir. 1993) 23

Hahn v. Oregon Physicians' Services, 868 F.2d 1022 (9th Cir. 1988), *cert. denied*, 493 U.S. 846 (1989) 8, 26

Harron v. United Hospital Center, Inc., 522 F.2d 1133 (4th Cir. 1975), *cert. denied*, 424 U.S. 916 (1976) 11

Hassan v. Independent Practice Associates, 698 F. Supp. 679 (E.D. Mich. 1988) 8, 18, 22

Indiana Grocery, Inc. v. Super Valu Stores, Inc., 864 F.2d 1409 (7th Cir. 1989) 11, 13

Interface Group, Inc. v. Massachusetts Port Authority, 816 F.2d 9 (1st Cir. 1987) 11

TABLE OF AUTHORITIES—Continued

	Page
International Logistics Group, Ltd. v. Chrysler Corp., 884 F.2d 904 (6th Cir. 1989), *cert. denied*, 494 U.S. 1066 (1990)	11
Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2 (1984)	*passim*
L.A. Draper & Son v. Wheelabrator-Frye, Inc., 735 F.2d 414 (11th Cir. 1984)	11
Lie v. St. Joseph Hospital, 964 F.2d 567 (6th Cir. 1992)	22
Miller v. Indiana Hospital, 814 F. Supp. 1254 (W.D. Pa.), *aff'd*, 975 F.2d 1550 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 1366 (1993)	24
NCAA v. Board of Regents of the University, 468 U.S. 85 (1984)	*passim*
National Bancard Corp. v. VISA, U.S.A., Inc., 779 F.2d 592 (11th Cir.), *cert. denied*, 479 U.S. 923 (1986)	24
National Society of Professional Engineers v. United States, 435 U.S. 679 (1978)	7
Northwest Medical Laboratories, Inc. v. Blue Cross & Blue Shield, Inc., 794 P.2d 428 (Or. 1990)	8, 14, 25
Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284 (1985)	8, 23
Oksanen v. Page Memorial Hospital, 945 F.2d 696 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 973 (1992)	10, 21, 22
Oltz v. St. Peter's Community Hospital, 861 F.2d 1440 (9th Cir. 1988)	10, 24
Palmer v. BRG, Inc., 498 U.S. 46 (1990)	7
Reazin v. Blue Cross & Blue Shield, Inc., 899 F.2d 951 (10th Cir.), *cert. denied*, 497 U.S. 1005 (1990)	10
Rutman Wine Co. v. E. & J. Gallo Winery, 829 F.2d 729 (9th Cir. 1987)	12, 16
Seagood Trading Corp. v. Jerrico, Inc., 924 F.2d 1555 (11th Cir. 1991)	11, 12, 16
Sewell Plastics, Inc. v. Coca-Cola Co., 720 F. Supp. 1186 (1988)	11

TABLE OF AUTHORITIES—Continued

Page

Smith Machinery Co. v. Hesston Corp., 878 F.2d 1290 (10th Cir. 1989), *cert. denied*, 493 U.S. 1073 (1990) 11

Spectrum Sports, Inc. v. McQuillan, 113 S. Ct. 884 (1993) 12

Stamatakis Industries v. King, 965 F.2d 469 (7th Cir. 1992) 13

Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320 (1961) 18

United States v. Brown University, 1993-2 Trade Cas. (CCH) ¶ 70,358 (3d Cir. 1993) 8, 9, 10, 22

United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) 17

United States v. Topco Associates, 405 U.S. 596 (1972) 25

U.S. Healthcare, Inc. v. Healthsource, Inc., 986 F.2d 589 (1st Cir. 1993) 10, 18, 23

Westman Commission Co. v. Hobart International, Inc., 796 F.2d 1216 (10th Cir. 1986), *cert. denied*, 486 U.S. 1005 (1988) 11

STATUTES

Sherman Act

15 U.S.C. § 1 3

15 U.S.C. § 2 3

MISCELLANEOUS

7 Phillip E. Areeda, *Antitrust Law* ¶ 1503 (1986) .. 9

Phillip E. Areeda, *The Rule of Reason—A Catechism on Competition*, 55 Antitrust L.J. 571 (1986) 10

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TABLE OF AUTHORITIES—Continued

	Page
Thomas E. Kauper, *The Role of Quality of Health Care Considerations in Antitrust Analysis*, 51 L. & Contemp. Probs. 273 (1988)	16
2 E. Kintner, *Federal Antitrust Law* § 9.2 (1980)	17
William H. Page, *The Scope of Liability for Antitrust Violations*, 37 Stan. L. Rev. 1445 (1985)	13
Edward A. Snyder & Thomas E. Kauper, *Misuse of the Antitrust Laws: The Competitor Plaintiff*, 90 Mich. L. Rev. 551 (1991)	13
FTC Staff Advisory Opinion (Mar. 26, 1984)	21
Letter from Jeffrey Zuckerman, Director of the Bureau of Competition, FTC, to David Gates (Nov. 5, 1986)	15
46 Fed. Reg. 48,982 (1981) (FTC Policy Statement on Physician Agreements to Control Medical Prepayment Plans)	15
S. 724-C, 216th Leg. (approved July 28, 1993) (McKinney's Session Laws of New York 1993)	14

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

I. Statement of the Facts

Respondent, Mohawk Valley Medical Associates, Inc. ("MVMA"), is an independent practice association ("IPA") of member physicians organized to provide medical care to enrollees of Mohawk Valley Physicians' Health Plan, Inc. ("MVP" or the "Plan"). Joint Appendix ("J.A.") at A-253. MVMA and MVP together constitute a joint venture [1] operating as an IPA-model

[1] It is an uncontroverted fact that MVMA and MVP together constitute a joint venture. Petition at 2.

health maintenance organization ("HMO").[2] *Id.* MVP is licensed as an HMO in the State of New York. J.A. at A-37.

Petitioner, Capital Imaging Associates, P.C. ("Capital"), is a private practice radiology group located in Albany County, New York. Capital offers a full range of diagnostic imaging services (including magnetic resonance imaging ("MRI") services) in an extensive region. J.A. at A-253.

In order for an entity to operate as an HMO in New York, it must apply to the New York State Department of Health for a Certificate of Authority. As part of its regulatory authority, the Department approves the service area within which an HMO can provide services. J.A. at A-258. MVMA and MVP (together referred to as the "Health Plan") have never been certified to provide services in Albany County. J.A. at A-258-59.

MVMA's membership procedures require that in order to be a member of MVMA, a physician must provide medical services in an office within the IPA's service area, and have staff privileges in hospitals participating with MVP. J.A. at A-71.[3] Capital sought membership in the IPA although its offices were located outside the Health Plan's service area. J.A. at A-89. Capital's request was denied by the MVMA, and Capital was informed at that time that the denial of membership was due to not having an office in the service area. J.A. at A-359.

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[2] "One of the essential features of an HMO is that it selects preferred physicians and excludes others thereby creating competition among the providers of health care services." *Capital Imaging Assocs., P.C. v. Mohawk Valley Medical Assocs., ("Capital I")*, 725 F. Supp. 669, 673 (N.D.N.Y. 1989).

[3] Physicians who have an office within the service area but who do not have admitting privileges at participating hospitals may, nevertheless, obtain membership if they submit additional information concerning hospital coverage. J.A. at A-71.

MVMA has made exceptions to the requirement that a physician participating in MVMA have an office in the service area when there is a need for the type of additional physicians requesting membership. J.A. at A-27. However, at the time Capital sought membership, there was no need for additional radiologists. J.A. at A-89.

II. Proceedings Below

A. *Opinion of the District Court*

Capital initiated this antitrust action in December of 1988, alleging violations of Section 1 and Section 2 of the Sherman Act, 15 U.S.C. §§ 1, 2. Capital's Section 2 claim was that MVMA and MVP had attempted to monopolize "the sale and use of diagnostic imaging equipment in the *United States*." J.A. at A-11 (emphasis added). The district court dismissed this claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, and held that

> [n]ot only is there no *dangerous probability* that defendants will succeed in monopolizing the markets identified by plaintiff [i.e., the United States and the market for referrals to private diagnostic radiology centers in the Albany area], there is no present *possibility* defendants will do so.

Capital I, 725 F. Supp. at 678 (emphasis in original). Capital did not press this claim on appeal.

Capital's alternate theory, under Section 1 of the Sherman Act, was that MVMA and MVP, along with Two Rivers Radiology, P.C. ("Two Rivers"), a group of radiologists in competition with Capital, conspired to exclude Capital from providing services to MVMA and MVP. Although the district court found that Capital had failed to establish any impact on "competitive conditions [resulting from the Health Plan's conduct] sufficient to defeat a motion for summary judgment," the court granted

Capital discovery under Rule 56(f) of the Federal Rules of Civil Procedure. *Id.* at 679.

After over two years of discovery, Capital remained unable to show that the Health Plan's actions constituted an unreasonable restraint of trade. Specifically, the court held that there was no agreement between MVMA and Two Rivers. The court also held that Capital failed to show either actual injury to competition or that the Health Plan had market power sufficient to create an inference of injury to competition. In granting the Health Plan's motion for summary judgment, the district court held that

> Capital has come forward with no proof that defendants have the ability to increase prices or decrease output in the market—either of which would constitute actual detrimental effects sufficient to demonstrate that the defendants possess market power. Accordingly, the court concludes that Capital has failed to meet its burden with respect to this essential element of its claim that defendants' actions constitute an unreasonable restraint of trade.

Capital Imaging Assocs., P.C. v. Mohawk Valley Medical Assocs., Inc., ("Capital II"), 791 F. Supp. 956, 967 (N.D.N.Y. 1992).

B. *Opinion of the Court of Appeals*

Capital appealed the summary judgment of its Section 1 claim, arguing, for the first time, that MVMA, an organization of physicians, was a walking conspiracy. Although the court of appeals determined that Capital had presented sufficient evidence with respect to its new argument that the conduct of the physicians who controlled MVMA constituted a conspiracy, the court nevertheless affirmed the district court's grant of summary judgment.[4] Specifically, the court of appeals held that Capital

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[4] Capital introduced this new conspiracy claim on appeal. Initially, Capital claimed a conspiracy between MVMA and MVP. For the

had failed to show that the Health Plan's conduct constituted an unreasonable restraint of trade.[5] In so holding, the court of appeals stated that

> Capital's position is simply that it has been harmed as an individual competitor. It has not shown that defendants' activities have had any adverse impact on price, quality, or output of medical services offered to consumers in the relevant market.

Capital Imaging Assocs., P.C. v. Mohawk Valley Medical Assocs., Inc., 996 F.2d 537, 547 (2d Cir. 1993). The Court elaborated on Capital's failure to meet its burden of showing any adverse impact on competition stating that

> Capital concedes in its brief that whether or not it is admitted into the physicians' association, the fee for radiological services would remain the same. In addition, Capital failed to adduce significant evidence that its exclusion has, in fact, resulted in any decrease in the quality of radiology services to the HMO's patients. Therefore, Capital has not made an adequate showing of detrimental effects to obviate the need to show that appellees possess market power sufficient to stifle competition.

Id. at 546.

Because the court of appeals went on to endorse the district court's conclusion that neither MVMA nor MVP

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first time on appeal, Capital claimed that "the actions of one of the defendants constituted a conspiracy in and of itself. The actions of the [MVMA] Board in excluding Capital from membership satisfies the requirement of concerted action." Brief of Plaintiff-Appellant at 43. *See* Brief of Defendant-Appellees at 20-22.

[5] Capital continuously cites to the text of the Second Circuit's opinion regarding the evidence of the conspiracy. However, the court of appeals' affirmance of the district court assumed, arguendo, that sufficient evidence of an agreeemnt did exist. Thus, the conspiracy discussion should not be confused with the lack of proof of market power or anticompetitive effects.

possessed market power, it affirmed the district court's judgment. Indeed, the court of appeals correctly determined that MVMA and MVP had a "*de minimis* market share" based upon Capital's own definition of the relevant geographic market—*the area* lying within 100 miles of Albany, New York—and its definition of the relevant product market—radiological services. 996 F.2d at 547 (emphasis in original).

The court of appeals' conclusion that MVA and MVMA lacked the power to injure competition or force consumers to accept higher premiums or lower quality medical care was based upon uncontroverted evidence. *Id.* That evidence reveals that within the geographic market defined by Capital, the Health Plan's enrollees represent 2.3% of HMO enrollees and 1.15% of the total patient population,[6] and that the Health Plan contracted with only 6.75% of the physicians.[7]

Just as it attempts to redefine the geographic market in its current Petition, Capital attempted, on appeal, to avoid the consequences of a devastatingly small market share by arguing (for the first time on appeal) that the relevant geographic market was a new, undefined smaller geographic market within the 100-mile radius of Albany—what Capital now refers to as the 14 counties in which

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[6] Within the geographic market defined by Capital, there are 54 HMOs with 4,196,806 enrollees. The Health Plan's total enrollment is 100,500.

[7] Capital refers to a percentage of physicians in a limited geographic area which have contracted with MVMA. Capital submitted similar figures to the district court which concluded that "on closer examination it becomes evident that these figures account for only a very small percentage of the consumers and the services at issue in the relevant antitrust market." *Capital II*, 791 F. Supp. at 966. The court concluded that the Health Plan's market data, which was not disputed by Capital, more accurately reflected the relevant market.

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MVP operates.[8] However, the court of appeals correctly determined that "[t]his new market definition was not presented to the trial court and comes too late for our consideration." *Capital Imaging*, 996 F.2d at 547.

SUMMARY OF THE ARGUMENT

This Court and the lower federal courts have routinely held that a plaintiff in a "rule of reason" case under Section 1 of the Sherman Act must present proof that the defendant possesses market power or has caused anticompetitive effects in the relevant market in order to avoid Summary Judgment. In this case, Capital now asks the Court to grant certiorari in order to change that standard. Capital's request should be denied.

The Circuits agree that the rule of reason analysis is applicable to all conduct except for a limited category of "naked restraints" which are considered *per se* illegal.

> *Per se* rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct.[9]

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[8] It should be noted that, throughout this case, Capital has repeatedly attempted to redefine the relevant geographic market which, at the outset, it defined to be the "United States." J.A. at A-11. In the district court, Capital realized its blunder and redefined the relevant geographic market as *the area* lying within a 100-mile radius of Albany, New York. *Capital Imaging*, 996 F.2d at 547. Then, on appeal, Capital once again attempted to further redefine the relevant geographic market as a smaller area lying somewhere within a 100-mile radius of Albany. *Id.*

[9] *See National Soc'y of Prof. Eng'rs v. United States*, 435 U.S. 679, 692 (1978) (agreements are *per se* illegal only if their "nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality"). *See also Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 723-24 (1988). Such practices include: agreements among competitors to allocate territories to minimize competition, *Palmer v. BRG, Inc.*, 498 U.S. 46, 48 (1990); price-fixing among competitors, *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 423

NCAA v. Board of Regents of the Univ., 468 U.S. 85, 103-104 (1984).

Courts have uniformly held that HMO activities are governed by the rule of reason rather than the *per se* rule because HMOs plainly increase competition in health care markets. *See, e.g., Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332, 339 n.7 (1982); *Northwest Medical Labs., Inc. v. Blue Cross & Blue Shield, Inc.*, 794 P.2d 429 (Or. 1990); *Hahn v. Oregon Physicians' Servs.*, 868 F.2d 1022, 1029 n.5 (9th Cir. 1988), *cert. denied*, 493 U.S. 846 (1989); *Hassan v. Independent Practice Assocs.*, 698 F. Supp. 679, 688-90 (E.D. Mich. 1988). As the district court correctly observed, HMOs need to exclude physicians in order to achieve their procompetitive goals. *Capital II*, 791 F. Supp. at 963. Indeed, if HMOs were required to accept all physicians, they would not be able to obtain lower physician prices in return for providing the participating physicians increased patient volume.[10] The Second Circuit correctly applied that analysis to the facts of this case.

Under the rule of reason, the initial burden is on the plaintiff to introduce evidence that the challenged conduct causes anticompetitive effects in the marketplace. Then and only then does the burden shift to the defendant to establish a procompetitive justification for the conduct. *See, e.g., United States v. Brown University*, 1993-2 Trade Cas. (CCH) ¶ 70,358 (3d Cir. 1993); *Bhan*, 929 F.2d

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(1990); a tying arrangement by a seller with appreciable economic power, *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 112 S. Ct. 2072, 2079 (1992); and group boycotts by market participants that possess market power or unique access to a business element necessary for effective competition, *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 298 (1985).

[10] The logical result of Capital's argument that Capital's exclusion from the Health Plan causes anticompetitive effects in the marketplace, is to require an HMO to accept any physician who applies, wherever located.

at 1413; 7 Phillip E. Areeda, *Antitrust Law* ¶ 1502, at 371 (1986).

Capital wants this Court to fashion a new analysis that would turn the rule of reason on its head, by placing the burden on MVMA and MVP to justify their conduct before Capital has introduced any evidence that such conduct could create harm to competition. This new analysis, designed to protect Capital's profits, would not require evidence that competition and consumer welfare be adversely affected. Certiorari should be denied because Capital's injury is not one the antitrust laws were designed to protect.

ARGUMENT—REASONS FOR DENYING CERTIORARI

I. COURTS HAVE CONSISTENTLY APPLIED THE RULE OF REASON ANALYSIS THAT PLACES THE INITIAL BURDEN ON THE PLAINTIFF TO SHOW THAT THE CHALLENGED CONDUCT PRODUCES ADVERSE EFFECTS ON THE MARKET

The Third Circuit recently articulated the analysis consistently used by courts in determining whether a restraint is unreasonable under the rule of reason.[11]

> The plaintiff bears an initial burden under the rule of reason of showing that the alleged combination or agreement produced adverse, anticompetitive effects within the relevant product and geographic markets. *Tunis Bros. Co. v. Ford Motor Co.*, 952 F.2d 715, 722 (3d Cir. 1991), *cert. denied*, 112 S. Ct. 3034 (1992); *Cernuto, Inc. v. United Cabinet Corp.*, 595 F.2d 164, 166 (3d Cir. 1979). The plaintiff may satisfy this burden by proving the existence of actual anticompetitive effects, such as reduction of output, *see FTC v. Indiana Federation of Dentists*, 476 U.S.

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[11] The facts of the *Brown University* case, 1993-2 Trade Cas. (CCH) ¶ 70,358, involve a horizontal conspiracy challenged under Section 1 of the Sherman Act. The Third Circuit concluded that the district court should have applied the rule of reason analysis to the case.

> 447, 460-61, 106 S. Ct. 2009, 2019 (1986), increase in price, or deterioration in quality of goods or services, *see Tunis Bros.*, 952 F.2d at 728. Such proof is often impossible to make, however, due to the difficulty of isolating the market effects of challenged conduct. 7 P. Areeda, *Antitrust Law* ¶ 1503, at 376 (1986). Accordingly, courts typically allow proof of the defendant's "market power" instead. *Tunis Bros.*, 952 F.2d at 727; *see NCAA v. Board of Regents of the Univ. of Oklahoma*, 468 U.S. 85, 110, 104 S. Ct. 2948, 2965 (1984). Market power, the ability to raise prices above those that would prevail in a competitive market, *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 27 n.46, 104 S. Ct. 1551, 1556 n.46 (1984), is essentially a "surrogate for detrimental effects." *Indiana Dentists*, 476 U.S. at 460-61, 106 S. Ct. at 2019 (quoting 7 P. Areeda, *supra* ¶ 1511, at 429).

Brown University, ¶ 70,358, at 70,889.[12] This analysis is widely accepted by the other circuits,[13] including the Second Circuit which adopted the same standard in this case. *See Capital Imaging*, 996 F.2d at 543.

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[12] *See also* Phillip E. Areeda, *The Rule of Reason—A Catechism on Competition*, 55 Antitrust L.J. 571, 581-582 (1986).

> [T]he plaintiff must show that the defendant has engaged in a type of activity that can restrain trade significantly. That is, he must show that the challenged restraint is of a kind that can impair consumer welfare, and that the impairment is likely to be significant, by demonstrating either the effects of the restraint or the defendant's market power.

[13] *Flegel v. Christian Hosp. Northeast-Northwest*, 1993-2 Trade Cas. (CCH) ¶ 70,355, at 70,867-68 (8th Cir. 1993); *U.S. Healthcare, Inc. v. Healthsource, Inc.*, 986 F.2d 589, 595-96 (1st Cir. 1993); *A-Abart Elec. Supply, Inc. v. Emerson Elec. Co.*, 956 F.2d 1399 (7th Cir.), *cert. denied*, 113 S. Ct. 194 (1992); *Oksanen v. Page Memorial Hosp.*, 945 F.2d 696, 709 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 973 (1992); *Reazin v. Blue Cross & Blue Shield, Inc.*, 899 F.2d 951 (10th Cir.), *cert. denied*, 497 U.S. 1005 (1990); *Oltz v. St. Peter's Community Hosp.*, 861 F.2d 1440, 1445 (9th Cir. 1988).

A valid Section 1 claim is limited to activities having an adverse impact on the output, quality, or price of goods and services offered to consumers; those activities which have no such effects do not violate Section 1, and should not be restricted. *NCAA*, 468 U.S. at 106-108; *Jefferson Parish*, 466 U.S. at 31 n.52;[14] *Cayman Exploration Corp. v. United Gas Pipe Line Co.*, 873 F.2d 1357, 1360 (10th Cir. 1989); *Smith Mach. Co. v. Hesston Corp.*, 878 F.2d 1290, 1295-96 (10th Cir. 1989), *cert. denied*, 493 U.S. 1073 (1990); *Interface Group, Inc. v. Massachusetts Port Auth.*, 816 F.2d 9, 10 (1st Cir. 1987); *Westman Comm'n Co. v. Hobart Int'l, Inc.*, 796 F.2d 1216, 1220 (10th Cir. 1986), *cert. denied*, 486 U.S. 1005 (1988); *Sewell Plastics, Inc. v. Coca-Cola Co.*, 720 F. Supp. 1186, 1218 (1988).[15] Capital's unsupported assertions and ever-changing arguments about the way in which the Health Plan's conduct has had a negative impact on competition must be rejected.

A. The Challenged Conduct Has Not Caused Any Restraints on Output

Capital has failed to demonstrate that the Health Plan's conduct has had an effect on output in the health care

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[14] Capital takes exception to the court of appeals' citation of *Jefferson Parish*. However, in this instance, it is not relevant that *Jefferson Parish* involves a vertical restraint because the proposition in *Jefferson Parish* that "[w]ithout a showing of actual adverse effect on competition, [a plaintiff] cannot make out a case under the antitrust laws . . . ." 466 U.S. at 31 (quoted by the court of appeals, 996 F.2d at 547), is equally applicable to horizontal restraints, such as that alleged in the present case.

[15] Mere competitive advantage or unfair conduct by itself is insufficient to show anticompetitive effect. *Seagood Trading Corp. v. Jerrico, Inc.*, 924 F.2d 1555, 1573 (11th Cir. 1991); *International Logistics Group, Ltd. v. Chrysler Corp.*, 884 F.2d 904, 909 (6th Cir. 1989), *cert. denied*, 494 U.S. 1066 (1990); *Indiana Grocery, Inc. v. Super Valu Stores, Inc.*, 864 F.2d 1409, 1413 (7th Cir. 1989); *L.A. Draper & Son v. Wheelabrator-Frye, Inc.*, 735 F.2d 414, 421 (11th Cir. 1984); *Harron v. United Hosp. Ctr., Inc.*, 522 F.2d 1133 (4th Cir. 1975), *cert. denied*, 424 U.S. 916 (1976).

financing, radiology services, or referral markets. The mere exclusion of Capital is not, in any way, a reduction in output in the noted markets. Indeed, consumers necessarily limit their "choice" of health service providers by electing to participate in a managed care plan. Consumers unhappy with the provider choices available in one plan may switch to other managed care plans or other types of health care financing. It is the availability of that choice—selecting from among competing health plans—which the antitrust laws are designed to protect. Both the lower federal courts and this Court have unanimously agreed that conduct which affects only the party challenging the conduct is not "unreasonable" under Section 1 of the Sherman Act.[16] As this Court has recently stated

> [t]he purpose of the [Sherman] Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market.

Spectrum Sports, Inc. v. McQuillan, 113 S. Ct. 884, 891-92 (1993).

Capital has established only that it has been precluded from participating in MVMA. While this may adversely

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[16] "[I]njury to the antitrust plaintiff alone is not sufficient to prove injury to competition." *Ferguson v. Greater Pocatello Chamber of Commerce, Inc.*, 848 F.2d 976, 982 (9th Cir. 1988); A simple reshuffling of competitors has no effect on competition. *Coffey v. Healthtrust, Inc.*, 955 F.2d 1388, 1393 (10th Cir. 1992); A mere competitive advantage, by itself, is insufficient to demonstrate anticompetitive effects. *Seagood*, 924 F.2d at 1573; The antitrust laws are not designed to guarantee every competitor tenure in the marketplace. *Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 735 (9th Cir. 1987); Exclusion of a single supplier is not enough to establish harm to competition. *Crane & Shovel Sales Corp. v. Bucyrus-Erie Co.*, 854 F.2d 802, 810 (6th Cir. 1988); The antitrust laws were enacted for the protection of competition, not competitors. *Copy-Data Sys., Inc. v. Toshiba Am., Inc.*, 663 F.2d 405, 410 (2d Cir. 1981); Without a showing of actual adverse effect on competition a plaintiff cannot make out a case under the antitrust laws. *Jefferson Parish*, 466 U.S. at 31.

affect Capital, it hardly amounts to a reduction in output. *See City of Chanute v. Williams Natural Gas Co.*, 955 F.2d 641, 652 (10th Cir.), *cert. denied*, 113 S. Ct. 96 (1992). From the perspective of consumers, the only effect is that one radiology supplier has been substituted for another. Yet, the mere reshuffling of suppliers does not violate the antitrust laws.[17] *Coffey v. Healthtrust, Inc.*, 955 F.2d 1388, 1393 (10th Cir. 1992).

Significantly, consumers have numerous choices of health plans. Indeed, approximately 53 HMOs, and numerous other indemnity insurers compete with MVP. If consumers are dissatisfied with a plan, they may simply select another. Unlike purchasers of Kodak copiers who were "locked in" to Kodak parts and services because of heavy capital investment, members of various health plans make no capital investment in those health plans. *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 112

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[17] Antitrust actions brought by competitors deserve close scrutiny by the courts. *Indiana Grocery*, 864 F.2d at 1419; *Alberta Gas Chems., Ltd. v. E.I. du Pont de Nemours & Co.*, 826 F.2d 1235, 1239 (3d Cir. 1987), *cert. denied*, 486 U.S. 1059 (1988). As one commentator has stated "[w]hen a business rival brings suit, it is often safe to infer that the [challenged] arrangement is beneficial to consumers." Frank H. Easterbrook, *The Limits of Antitrust*, 63 Texas L. Rev. 11 (1984). *See also* Edward A. Snyder & Thomas E. Kauper, *Misuse of the Antitrust Laws: The Competitor Plaintiff*, 90 Mich. L. Rev. 551 (1991) (Concluding that antitrust suits by competitor plaintiffs are not successful and for good reason); William H. Page, *The Scope of Liability for Antitrust Violations*, 37 Stan. L. Rev. 1445, 1479-1480 (1985) (In most cases, the exclusion of a supplier merely substitutes the injured firm's output for that of another or prevents such a substitution with no effect on total output in the market). Thus, Capital's assertion that it has lost business as a result of the challenged conduct "is no concern of the antitrust laws, which protect consumers from suppliers rather than suppliers from each other . . . . 'Competition is ruthless, unprincipled, uncharitable, unforgiving—and a boon to society, Adam Smith reminds us, precisely because of these qualities that make it a bane to other producers.'" *Stamatakis Indus. v. King*, 965 F.2d 469, 471 (7th Cir. 1992) (citation omitted).

S. Ct. 2072, 2086 (1992). When consumers are dissatisfied for whatever reason—including price or quality—they can, and do, switch to other health plans during every open season.[18]

Limiting the size of provider panels is an important aspect of managed care plans like MVP.[19] Indeed, "[o]ne of the essential features of an HMO [or other managed care plan] is that it selects preferred physicians [suppliers] and excludes others thereby creating competition among the providers of health care services." *Capital I*, 725 F. Supp. at 673. *See Northwest Medical*, 794 P.2d 428 (discussing the role of the HMO concept in fostering competition in health care financing markets). By contracting with only a limited number of physicians and hospitals, HMOs and other managed care plans actually encourage competition in the physician services market.[20]

Antitrust enforcement agencies also consider the exclusion of providers (i.e., suppliers) from HMOs and other managed care delivery systems to be procompeti-

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[18] Referral patterns by physicians not attributable to the contractual arrangements or market power of the Health Plan are market imperfections which do not give rise to antitrust liability. *See Jefferson Parish*, 466 U.S. at 26-27. The Court stated that "[w]hile these factors may generate 'market power' in some abstract sense, they do not generate the kind of market power that justifies condemnation of [the conduct alleged to have violated the antitrust law]." *Id.* at 27.

[19] In fact, until recently, New York HMO Law required HMOs to arrange for "out-of-plan" services through a separate insurance company. *See* S. 724-C, 216th Leg. (approved July 28, 1993) (McKinney's Session Laws of New York 1993). Therefore, the "restraint" on consumers alleged by Capital due to the fact that MVP subscribers cannot seek radiology services from non-participating physicians is unrelated to the joint venture entered into by MVP or MVMA.

[20] In contrast to IPA-HMOs that contract with physician organizations (called IPAs), staff model HMOs employ physicians who deliver services in the central facility. Group model HMOs contract with clinics or medical groups. J.A. at A-24.

tive. For example, the Federal Trade Commission ("FTC") has determined that "exclusive arrangements between HMOs and their participating (providers) . . . are likely to benefit consumers by stimulating competition among medical prepayment plans and physicians."[21] Notwithstanding these procompetitive benefits, Capital seeks to challenge an HMO's ability to freely select, or refuse to deal with, physicians, or groups of physicians.

B. The Challenged Conduct Has Not Caused a Restraint on Prices

Capital's exclusion from the IPA has not had and will not have any adverse effect on price. As indicated by the Second Circuit, Capital has admitted that its inclusion in the IPA would not affect the price of radiology services. *Capital Imaging*, 996 F.2d at 546. Indeed, Capital does not claim that its exclusion from the Health Plan in any way impacted price. "Capital has never offered any evidence of increased prices." Petition at 7 n.6.[22]

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[21] Letter from Jeffrey Zuckerman, Director of the Bureau of Competition, FTC, to David Gates (Nov. 5, 1986). Of course, exclusive contracts may have anticompetitive effects where a large percentage of suppliers are prevented from doing business with competing plans. Where competitors are deprived of an essential source of supply, antitrust violations may be present. However, no such problem exists in this case. As the FTC has stated in its policy statement "[a]ntitrust concern would . . . also arise if a partially integrated plan required its participating [providers] to sign contracts that effectively barred them from participating in any other prepayment plan, and so many [providers] were signed up that it was difficult for other plans to recruit a sufficient . . . panel." FTC Policy Statement on Physician Agreements to Control Medical Prepayment Plans, 46 Fed. Reg. 48,982, 48,991 (1981). Here, Capital makes no such allegation or claim.

[22] Indeed, at one time, the Health Plan needed radiologists to provide MRI services to Health Plan subscribers and, therefore, accepted bids to provide such services. J.A. at A-249. Capital submitted a bid to provide MRI services at $550 per procedure. However, the Health Plan entered into a contract with Two Rivers to provide MRI services at $510 per procedure. *Id.*

C. The Challenged Conduct Has Not Caused a Restraint on Quality

Capital also has failed to demonstrate any adverse effect on quality of services provided to consumers due to Capital's exclusion from the Health Plan.[23] Indeed, Capital asserts in its Petition "that effects on quality of professional services are [not] capable of precise measurement." Petition at 7 n.6. Thus, as the court of appeals correctly stated, "Capital failed to adduce significant evidence that its exclusion has, in fact, resulted in any decrease in the quality of radiology services to the HMO's patients." *Capital Imaging*, 996 F.2d at 546.[24] J.A. at A-448-49, A-459-60.

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[23] Capital's unsupported assertions that its services are of "high quality" are self-serving. In an attempt to support its assertions of quality differentials between itself and other radiology practices, Capital misquotes Dr. Meiselman who, in fact, says that *no* quality differences existed. J.A. A-578. Capital then seeks to excuse its failure to support its assertions by quoting a law review article. Petition at 25 (quoting Thomas E. Kauper, *The Role of Quality of Health Care Considerations in Antitrust Analysis*, 51 L. & Contemp. Probs. 273, 276, 294 (1988)). The quote from Kauper, taken in context, says that agreements that result in the lowering of quality are output restrictions only when there is no accompanying decrease in prices, and that this proposition has been recognized in those cases where defendants have sought to avoid liability by claiming their conduct did not lower quality. In our case, the Health Plan has made no such claim. Indeed, it is Capital, not the Health Plan which introduced the issue of quality. Moreover, the quote from Kauper implies that issues of quality are illusory since those who raise them are most often unable to substantiate them.

[24] Indeed, even if Capital's exclusion had, in fact, reduced the quality of radiology services available through MVMA, this reduction of quality is of no consequence in the market as long as consumers have other health plans available. The mere fact that consumers electing MVMA cannot utilize Capital does not establish a reduction of quality in the market. *Jefferson Parish*, 466 U.S. at 31; *Coffey*, 955 F.2d at 1393; *Seagood*, 924 F.2d at 1573; *Crane & Shovel*, 854 F.2d at 810; *Ferguson*, 848 F.2d at 982; *Rutman Wine*, 829 F.2d at 735; *Copy-Data*, 663 F.2d at 410.

D. Capital Has Failed To Show That the Health Plan Has Market Power

Because Capital has not demonstrated any actual adverse effect on competition, the rule of reason requires a demonstration of market power.[25] Consistent with the rule of reason, the Second Circuit supported the district court in concluding that Capital simply failed to establish the existence of market power in the geographic market which Capital, itself, defined.

> Thus, turning to the question of market power, we agree with the district court that Capital has failed to demonstrate that a genuine issue of material fact exists with respect to appellees' strength in the marketplace.

Capital Imaging, 996 F.2d at 547.[26]

The first step in assessing market power is defining the relevant market. *DeLong Equip. Co. v. Washington Mills Abrasive Co.*, 887 F.2d 1499, 1507 (11th Cir. 1989), *cert. denied*, 494 U.S. 1081 (1990). A party's share of the relevant market is indicative of the existence or nonexistence of market power. *Eastman Kodak*, 112 S. Ct. at 2081. The relevant product and geographic market must be defined from the standpoint of consumers. *See NCAA*, 468 U.S. at 112-13; *Jefferson Parish*, 466 U.S.

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[25] Capital has never challenged the assessment made by the district court that the Health Plan lacked market power in the geographic and product markets defined by Capital.

[26] Failing to establish market power, Capital seeks to minimize the need to do so by, for example, incorrectly quoting an antitrust law treatise. Petition at 21 (quoting 2 E. Kintner, *Federal Antitrust Law* § 9.2 (1980)). While it is true that a § 1 "violation may be established irrespective of whether the participants have power . . . ," this proposition is true, however, only if the case is *per se*. The case cited by Kintner for this proposition is *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), which was a *per se* price-fixing case, and in which the Court explicitly stated that "[a] conspiracy to fix prices violates § 1 . . . ." *Id.* at 224 n.59.

at 26-29. "[Y]ou can't pick a market without knowing the purpose of the choice." *Fishman v. Estate of Wirtz*, 807 F.2d 520, 568 (7th Cir. 1986) (Easterbrook, J., dissenting). *See also U.S. Healthcare, Inc. v. Healthsource, Inc.*, 986 F.2d 589 (1st Cir. 1993). The product or service market is composed of products or services that consumers view as reasonably interchangeable. *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961). The geographic market includes the entire area in which consumers could turn if the price of the product or service increased. *Id.* Before the district court, Capital asserted that the relevant geographic market was *the area* within a 100-mile radius from Albany, New York. Capital now seeks to avoid the consequences of its own market definition.

In this case, the relevant product market involves health care financing products offered by HMOs such as the Health Plan. It is only in such markets that consumers can be harmed by higher premiums (prices), or lower quality.[27] Capital admits to the appropriateness of the health care financing market in this case. "Patients consider the prices offered by MVP and its competitors in the health insurance market, not prices in the market for medical services." Petition at 5 (citation omitted). Thus, unless the Health Plan possesses market power in the health care financing market, consumers will simply switch if the Health Plan offers a product with higher prices or lower quality. *Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins., Inc.*, 784 F.2d 1325, 1332-33 (7th Cir. 1986); *Hassan*, 698 F. Supp. at 694-95.

The Health Plan provided the district court with uncontroverted evidence that it did not possess market

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[27] The Health Plan purchases health services from physicians who are free to contract with other plans or private parties. Participating physicians in MVP are required to refer only MVP subscribers to other specialists participating in the Health Plan. Therefore, MVP and MVMA cannot affect the radiology referral market.

power in the market defined by Capital. Indeed, Capital has attempted to redefine the relevant market several times, but has never been able to establish the existence of market power.[28] Within the market defined by Capital before the district court, the Health Plan's market share is undeniably *"de minimis."* *Capital Imaging*, 996 F.2d at 547.

Capital now refers to the percentage of physicians in each of the five counties in which the IPA services the Health Plan, but this area was never alleged as a geographic market or addressed by the district court. Moreover, the physicians from the five counties who participate in the IPA do not have exclusive contracts with MVMA and are free to service other health plans and private patients.[29] The participation of these physicians in MVMA does not say anything about MVP's market power, or lack of power, in either the health care financing, or HMO market. Thus, Capital's market statistics are not credible evidence

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[28] Perhaps because of the hopelessness of its cause, Capital's definition of the relevant market has been a continuous moving target. Initially, in the complaint, Capital alleged the relevant market to be "the sale and use of diagnostic imaging equipment in the United States." J.A. at A-11. Subsequenlty, in its statement pursuant to Rule 10(J) of the Local Rules of the Northern District of New York, Capital described the relevant market as the market for referrals to private diagnostic radiology centers offering a complete range of diagnostic imaging technology in an area within a radius of at least 100 miles from Albany, New York. J.A. at A-537. Still later, in opposing Defendants' Motion for Summary Judgment, Capital requested leave of the court to amend its complaint further to define "[t]he relevant market for purposes of this action [as] the market for radiology referrals within a radius of 100 miles from Albany, New York." *Capital II*, 791 F. Supp. at 965; J.A. at A-819 (citing Plaintiff's Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment, Supplemental Appendix ("S.A.") at 94).

[29] The Health Plan cannot be held responsible for the alleged fact that contracting physicians do not use Capital for radiology services for non-Health Plan patients. *Jefferson Parish*, 406 U.S. at 26-27.

of market power, and, in any case, are offered far too late.[30]

Capital's reliance upon the analysis in *NCAA* and *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986), to assert that evidence of market power is unnecessary, is at best misguided and at worst misleading as applied to this case. In those cases, it was plausible to infer that the anticompetitive effects of the concerted conduct were the proximate result of market power. By contrast, in this case, Capital is not able to offer any plausible theory explaining how the Health Plan possibly could have the market power to maintain prices above competitive levels of profitability, or to reduce quality or output below competitive levels in any relevant market.

> [T]he Court has only condoned dispensing with proof of market power for naked price and output restraints, and thus appears to have been addressing only restraints so pernicious and without redeeming virtues that per se analysis is almost warranted. Second, in each case in which it has declined to require proof of market power, the Court has found specific evidence of anticompetitive effects, *NCAA*, 468 U.S. at 106-108; *Indiana Fed'n of Dentists*, 476 U.S. at 460-61, and held that in such instances, " 'proof of

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[30] The Second Circuit summarized the market power data supplied by the Health Plan to the district court:

> Capital defined the relevant geographic market as that area lying within a 100-mile radius of Albany, New York. . . . *See Capital II*, 791 F. Supp. at 965. Appellees have accepted these market boundaries and have presented proof that within this 100-mile radius, the Health Plan's 100,500 enrollees represent only 2.3 percent of the region's HMO subscribers and Mohawk Valley's membership includes only 6.75 percent of the region's physicians. Once competition from non-HMO sources within the 100 mile radius is included, the appellees' market share drops even further to merely 1.15 percent of the total insured [sic] patient population. Capital has not contravened the *accuracy* of these figures.

Capital Imaging, 996 F.2d at 547 (emphasis in original).

> actual detrimental effects, such as reduction in output,' can obviate the need for an inquiry into market power, which is but a 'surrogate for detrimental effects.'" 476 U.S. at 460-61 (quoting 7 Phillip Areeda, *Antitrust Law* 1511 (1986)). Third, in each case the Court has found that the defendants possessed market power anyway. *Id.* at 460.

Thomas M. Jorde & David J. Teece, *Programs from the 1992 Annual Meeting: The Boundaries of Horizontal Restraints: Communication and Cooperation Among Competitors: Rule of Reason Analysis of Horizontal Arrangements: Agreements Designed to Advance Innovation and Commercialize Technology*, 61 Antitrust L.J. 579, 603-604 n.69 (1993).

E. The Burden of Proof Shifts to the Health Plan Only After Capital Has Shown Anticompetitive Effects

Capital attempts to encourage this Court to accept the theory that the Health Plan's alleged failure to offer procompetitive justifications for its conduct defeats summary judgment without regard to Capital's failure to demonstrate anticompetitive effects or market power.[31] That theory and Capital's claims must fail. *Oksanen v. Page Memorial Hosp.*, 945 F.2d 696, 699 (4th Cir. 1991),

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[31] For instance, Capital states that "[m]arket power comes to the fore only when a procompetitive justification exists." Petition at 19 (citing *FTC Staff Advisory Opinion* (Mar. 26, 1984)). Not only is this assertion a misstatement of the applicable law, but it is squarely and unequivocally contradicted by the very FTC Opinion cited by Capital. The FTC clearly states that its opinion applied the "rule of reason" analysis, and looked to the degree of KPS' market power (25% of the area's population, and 33% (approx.) of area residents with private health insurance). Only after it had found KPS to possess market power did the FTC go on to analyze procompetitive justifications. The FTC stated that

> [b]ecause the proposed restraint may be substantially anticompetitive in some respects [due to KPS' market power], we have attempted under the rule of reason to assess its countervailing justifications.

FTC Staff Advisory Opinion (Mar. 26, 1984), at 4.

cert. denied, 112 S. Ct. 973 (1992). The Health Plan is not required to demonstrate that the challenged conduct promotes a procompetitive purpose, unless the plaintiff meets its initial burden of establishing adequate evidence of market power or actual anticompetitive effects. *Brown University*, 1993-2 Trade Cas. (CCH) ¶ 70,358, at 70,889.

> [U]nder the rule of reason, [plaintiff] bears the burden of proving the actions of the defendants have unreasonably restrained trade. [*Jefferson Parish*], 466 U.S. at 29. To meet this burden, [plaintiff] must prove what market he contends was restrained and that the defendants played a significant role in the relevant market. Absent this market power, any restraint on trade created by the defendants' actions is unlikely to implicate section 1.

Oksanen, 945 F.2d at 709.

II. THE RULE OF REASON IS APPLICABLE TO BOTH HORIZONTAL AND VERTICAL RESTRAINTS

Courts have been consistent in their application of the rule of reason to both horizontal and vertical restraints.[32] As the First Circuit has stated

> We doubt that the modern Supreme Court would use the boycott label to describe, or the rubric to condemn, a joint venture among competitors in which participation was allowed to some but not all, *compare Northwest Wholesale Stationers, Inc. v. Pacific*

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[32] *See Hassan*, 698 F. Supp. 679 (The court analyzed the joint venture aspects of an IPA arrangement and concluded that the rule of reason was applicable although there were horizontal aspects to the IPA). *See also Flegel*, 1993-2 Trade Cas. (CCH) ¶ 70,355 (8th Cir. 1993); *Austin v. McNamara*, 979 F.2d 728 (9th Cir. 1992); *Lie v. St. Joseph Hosp.*, 964 F.2d 567 (6th Cir. 1992); *Bhan*, 929 F.2d 1404; *Oksanen*, 945 F.2d 696; *Collins v. Associated Pathologists, Ltd.*, 844 F.2d 473 (7th Cir.), *cert. denied*, 488 U.S. 852 (1988).

> *Stationery & Printing Co.*, 472 U.S. 284, 105 S. Ct. 2613, 86 L.Ed.2d 202 (1985), with *Associated Press v. United States*, 326 U.S. 1, 65 S. Ct. 1416, 89 L.Ed. 2013 (1945), although such a restriction might well fall after a more complete analysis under the rule of reason.

U.S. Healthcare, 986 F.2d at 594.[33] *See Futurevision Cable Sys. v. Multivision Cable TV*, 789 F. Supp. 760, 774-75 (S.D. Miss. 1992), *aff'd*, 986 F.2d 1418 (5th Cir. 1993).

Indeed, this Court has made it abundantly clear that "horizontal" boycotts or refusals to deal must be treated under the rule of reason, unless the participants in the alleged conspiracy have a dominant market position and are able to cut off access to a supply, facility, or market necessary to enable the boycotted party to compete. *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 294 (1985).[34]

In a desperate attempt to rewrite the antitrust history of horizontal agreements, Capital either mistakenly or intentionally misrepresents that six circuit courts of appeals "have resisted attempts by antitrust defendants to assert purported lack of market power as an excuse for horizontal restraints of trade." Petition at 17. In fact, none of the cases cited by Capital support this proposition

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[33] There can be no doubt that MVMA's relationship with MVP is a legitimate joint venture. MVP pays MVMA on the basis of a negotiated, fixed-amount per enrollee per month (capitation payment). Brief of Plaintiff-Appellant at 5. Thus, although individual MVMA physicians are paid on the basis of fee-for-service, those fee-for-service payments, in the aggregate, are limited by the capitation amount paid by MVP to MVMA. Moreover, twenty percent of each physician's compensation is withheld in order to assure that the capitation amount is sufficient. J.A. at A-63.

[34] The *Northwest Wholesale* case involved a horizontal agreement among competitors to exclude another competitor from a group purchasing cooperative. In that case, the Supreme Court reversed the court of appeals in finding that *per se* analysis was not applicable.

and, moreover, several of the cases clearly reach the opposite conclusion.[35]

III. THE CONDUCT CHALLENGED BY CAPITAL IS NOT A NAKED RESTRAINT

There can be no doubt that HMOs are procompetitive precisely because of the exclusion of some providers.

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[35] Capital cites *Oltz* for the proposition that market effects are not necessary in horizontal cases. Nevertheless, the next sentence of text following Capital's quotation from *Oltz*, 861 F.2d at 1448, reads: "[b]ecause market definition and market power are merely tools designed to uncover competitive harm, proof of 'actual detrimental effects, such as a reduction of output, can obviate the need . . . [for] elaborate market analysis." *Id.* (citations omitted). The court in *Oltz* concluded that the plaintiff demonstrated actual anticompetitive effects. Although the Sixth Circuit criticized the findings of anticompetitive effects by the FTC, it gave deference to those findings in *In re Detroit Auto Dealers Ass'n*, 955 F.2d 457 (6th Cir.), *cert. denied*, 113 S. Ct. 461 (1992). However, the court clearly understood it must "examine the evidence of the power of petitioners in the relevant market." 955 F.2d at 470 (citations omitted). The 1988 Third Circuit opinion in *Miller v. Indiana Hospital*, 814 F. Supp. 1254 (W.D. Pa.), *aff'd*, 975 F.2d 1550 (3d Cir. 1992), *cert. denied*, 113 S.Ct. 1366 (1993), cited by Capital is a prior opinion which does not address the substance of Capital's antitrust claims. However, on remand, the district court clearly did not support Capital's proposition. 814 F. Supp. at 1260.

> In order for plaintiff to meet his burden, he must prove what market he contends was restrained and that the defendants played enough of a significant role in the relevant market to impair competition significantly. . . . 'Market power means the ability to injure consumers by curtailing output and raising price.' . . . Without such market power, any restraint on trade created by the defendants' actions is unlikely to implicate Section 1.

Id. In the text of the Eleventh Circuit's opinion in *National Bancard Corp. v. VISA, U.S.A., Inc.*, 779 F.2d 592 (11th Cir.), *cert. denied*, 479 U.S. 923 (1986), following the quote by Capital, the court concludes, "[t]his case does not fall in a sufficiently similar fact pattern to warrant strict application of the *NCAA* language. Therefore, in analyzing the competitive advantages and disadvantages of the [challenged restraint], market power was a proper and useful tool for the district court." 779 F.2d at 604.

Northwest Medical, 794 P.2d 428. Indeed, Capital concedes as much. Moreover, Capital also concedes that the Health Plan constitutes a "joint venture." Petition at 2. Given these concessions, Capital cannot plausibly argue that the Health Plan's conduct amounts to a "naked restraint."

Even though the rule of reason clearly applies to this case, Capital would have this Court categorize the alleged anticompetitive conduct as a "naked restraint," and analyze it under Capital's version of the *per se* rule.[36] Courts have been consistent in categorizing the type of conduct that is, and that is not, a "naked restraint." Moreover, this Court has been consistent that the analysis for "naked restraints" does not apply to joint ventures because of their procompetitive effects. *NCAA*, 468 U.S. at 112; *Maricopa County*, 457 U.S. at 365 (Powell, J., dissenting); *Broadcast Music, Inc. v. Columbia Broadcasting*

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[36] Capital also attempts to present as authority, cases which are entirely inapplicable to this case. Capital cites *United States v. Topco Associates*, 405 U.S. 596 (1972), for the general proposition that this Court "emphasized that horizontal restraints are inherently anticompetitive." Petition at 12. Capital, however, neglects to indicate that the Court in *Topco* referred specifically to horizontal territorial market allocation agreements which have always been deemed *per se* antitrust violations. *Id.* at 608-10. This is not a *per se* case.

Further, Capital cites *Associated General Contractors v. California State Council of Carpenters*, 459 U.S. 519 (1983), for the general proposition that "[c]oercive activity . . . may be condemned without proof of its actual market effects." Petition at 15-16. However, the Court further stated that "[w]e do not know what kind of coercion defendants allegedly employed, we assume for purposes of decision that it had a predatory 'nature and character'," 459 U.S. at 528 n.18, and that had the plaintiff been required "to describe the nature of the alleged coercion . . . it might well have been evident that no violation of the law had been alleged," *Id.* at 528 n.17. The conduct in this case is not predatory coercion, and, thus, the case is not a precedent for the analysis of the Health Plan's conduct.

System, Inc., 441 U.S. 1, 22-23 (1979). A "naked restraint" exists only where there is a non-ancillary and explicit arrangement to restrict price or output. *Id.* It is abundantly clear that the present case involves neither type of restriction. There is no "naked restraint" involved here.

Capital's feeble attempt to bootstrap the application of the *per se* presumptions of anticompetitive effects by using words like "horizontal" and "naked restraint" are unavailing. Such incantations cannot change the undisputed facts in this case and the long-standing framework of analysis under Section 1 of the Sherman Act.[37]

CONCLUSION

Capital fails to assert any valid reasons for this Court to grant a Writ of Certiorari. Indeed, Capital's entire argument is constructed around a disingenuous effort to mischaracterize the Health Plan's conduct as a "naked restraint," and to fashion a new antitrust analysis not dependent on the existence of market power or actual anticompetitive effects.

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[37] Capital attempts to disingenuously blurr the clear difference between a "naked restraint" and the conduct at issue in this case. For example, Capital asserts that the court of appeals' citation of *Bhan*, 929 F.2d 1404, is inapposite and reveals a "misunderstanding" on the part of that court "of the role of empirical evidence in rule of reason analysis" because *Bhan* did not involve a "naked restraint." Petition at 25. However, as in *Bhan*, no "naked restraint" is involved in the current case either. Hence, reliance on *Bhan* is perfectly reasonable in the context of the present case. Similarly, Capital relies upon *Hahn* which concludes that defendant had the "burden . . . of putting forward a plausible, justifiable explanation for its conduct," *Hahn*, 868 F.2d at 1031. *Hahn* involved a "naked restraint." *Id.* at 1026. Indeed, the court clearly stated that "[o]rdinarily, [market power] is an essential ingredient in a rule-of-reason case" except "where the conduct should be viewed as a per se violation [i.e., as a "naked" restraint on price or output.]" *Id.* (citing *NCAA*, 468 U.S. at 109).

This Court and lower federal courts agree that an exclusion from a joint venture, by physicians participating in such joint venture, is analyzed in accordance with the rule of reason. Under the rule of reason, Capital is required initially to demonstrate that the Health Plan's conduct adversely affects competition or that it possesses market power. Capital has failed to meet its initial burden.

Capital, thus, attempts to manufacture a conflict among the Circuits and this Court as to its burden under the rule of reason. No such conflict exists. Indeed, the courts are in harmony with regard to the treatment of restraints like the one which is the subject of Capital's claim. This case poses no issues which require Supreme Court review.

For the foregoing reasons, Respondents respectfully request that this Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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